who ordered that the defendant's defence be struck off under Order 18 Rule 19.

The facts of the case are as follows: The plaintiffs are a company incorporated in Malaysia having an office at No. 54, Jalan Ampang, Kuala Lumpur. The defendant is an ex-employee of the plaintiffs. Paragraph 3 of the statement of claim states that the plaintiffs' claim against the defendant is for liquidated sum of monies due and owing from the defendant to the plaintiffs in the sum of $42,626.27. In paragraph 4, the plaintiffs aver that, by a letter dated October 13, 1983 addressed to the plaintiffs, the defendant undertook to settle the monies due to the plaintiffs. Paragraph 5 states that when the plaintiffs wrote to the defendant to pay them the said sum, the defendant refused and/or neglected to pay them. In the statement of defence, the defendant states that "The Defendant denies paragraph 3, 4 and 5 of the statement of claim and puts the plaintiffs to strict proof of the same."

It is clear that the defence is a blank denial of the plaintiffs' claim. There is no indication as to what is the nature of the defence. In my view it is nothing but a sham defence and the Senior Assistant Registrar was right in ordering that the defence be struck off. In *Remmington* v. *Scoles*,[1] Rigby L.J. in his judgment at pages 7 & 8, said,

"I do not wish in any way to infringe upon the salutory rule that a defendant has a right to put in issue any allegation in a statement of claim that he pleases ... But if the Court can on the facts that are not in dispute ascertain that the actual defence put in is really a defence which has no relation to the merits of the case, in other words, that it is a sham defence, then the Court ought to exercise the jurisdiction which it undoubtedly has, and order that the sham defence be struck out ..."

The defendant filed an affidavit (enclosure (9)) which purports to improve the statement of defence. I am unable to consider the affidavit evidence in the instant case. In *UMBC* v. *Palm & Vegetable Oils*,[2] Raja Azlan Shah Ag. L.P., as he then was, in delivering the judgment of the Federal Court, said, at page 207, "... we cannot but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence."

For the reasons stated above, I dismiss the appeal with costs.

*Appeal dismissed.*

Solicitors: *Anthony Fernandez & Partners; Shook Lin & Bok.*

## PUBLIC PROSECUTOR v. LIEW AH KIM & ORS.

[A.Cr. J. (Wan Yahya J.) July 15, 1985]
[Malacca – Criminal Appeal No. 46 of 1984]

*Criminal Law and Procedure – Unlawful assembly – Licence – Identification – Essential ingredient for the offence – Police Act, 1967, s. 27.*

Arising from the announcement of the Malacca State Government of its intention to develop Bukit China, the issue grew into a subject of public controversy. The Democratic Action Party had announced its intention to hold a "walk and jog" meeting at Bukit China on August 1984. On that day at 6.15 a.m. 20 or 30 persons had gathered at a temple located at the foot of the hill. Barely two hours later the number swelled to around 800 to 900 persons. The Chief Police Officer, Malacca, who was supervising his men around the area thought that no offence had been committed. Meanwhile on another part of the scene about 600 yards away from the temple, the police road block manned by police personnel stopped a busload of people wearing T-shirts with the words, "Save Bukit China" imprinted on them. The Chief Police Officer, who arrived at the spot a few minutes later, found the passengers were in the process of alighting from the bus. At this stage the officer issued a warning through his loud hailer to the effect that those who were gathered in front of him were committing unlawful assembly under section 27 of the Police Act and he ordered them to disperse immediately or face police action. The warning was ignored. On the Chief Police Officer's instruction the 18 respondents were arrested and taken to the police station. They were subsequently released on bail and charged in Court. At the hearing the Magistrate acquitted and discharged all the respondents without their defence being called. The prosecution appealed.

**Held**: (1) once there is a gathering of three or more persons in a public place then it is an assembly and when that assembly is an organised one as distinguished from a spontaneous one, then a licence under section 27(2) of the Police Act is required from the police. Failure to comply with the requirement will render the organiser and any participant, with the knowledge that such assembly was unlicenced, liable to prosecution under section 27(5)(a) of the Act;

(2) when a police officer arrests in this case the 18 accused, confines and takes them to the police station, gets the entire group photographed with him, takes down the particulars and then releases them on bail and the same persons as in the photograph appear to answer to the charge read against them, no further identification is required;

(3) the essential ingredients for the offence under the present charge are (i) there is an assembly or gathering or the coming together of three persons or more in public places; (ii) such assembly or gathering is a convened or organised event as distinguished from a spontaneous gathering of persons for a lawful object; (iii) no licence has been issued under section 27(2) by the O.C.P.D. for such assembly; (iv) each of the persons charged knew that he is taking part in an assembly, meeting *etc.* that is being convented or organized without a licence;

(4) the order of acquittal and discharge in this case

would be set aside and the case should be remitted for retrial before another Magistrate.

*Cases referred to:*

(1) *Siva Segara* v. *Public Prosecutor* [1984] 2 M.L.J. 212, 216.
(2) *Public Prosecutor* v. *Cheah Beng Poh & Ors.* [1984] 2 M.L.J. 225.

CRIMINAL APPEAL.

*Abdul Rahim bin Uda* (Deputy Public Prosecutor) for the appellant.

*Karpal Singh* (*K.C. Cheah & Yau Jiok Hua* with him) for the accused.

*Cur. Adv. Vult.*

**Wan Yahya J.**: Sometime in the month of February 1984 the State Government of Malacca made publicly known of its intention to develop the ancient 103 acres Chinese cemetery in Bukit China. The Trustees of the cemetery and also of the temple at the foot of the hill immediately objected to this proposal. The matter was prominently reported in the press and soon the entire issue understandably grew into a subject of public controversy. Amongst those who voiced their opposition to the State Government's proposal was the Democratic Action Party. It is an undisputed fact that a week or so before the event the Secretary of the Party, Mr. Lim Kit Siang, had announced through the press of his intention of holding a "walk and jog" meeting at Bukit China on August 19, 1984.

At 6.15 a.m. on that day, 20 or 30 persons had already gathered at the temple located at the foot of the hill. Barely two hours later, by 8.00 a.m., the number alarmingly swelled to around 800 to 900 persons.

The Chief Police Officer of Malacca, A.C.P. Ahmad Tajuddin bin Idris, who was previously aware of this event deployed one troop of the Federal Reserve Unit and several hundred policemen around the area. There were some sort of activity going on in the temple after which the participants started to walk and jog along the way uphill. No licence was ever asked for or issued in respect of this event. Apparently the crowd was not unruly. The O.C.P.D. who was supervising his men around the area thought that no offence had been committed by anyone.

Meanwhile, on another part of the scene about 600 yards away from the temple a police road block manned by several police personnel stopped a busload of people wearing T shirts with the words "Save Bukit China" imprinted on them. On the bus itself a banner bearing the inscription "Members of D.A.P. Selangor to join the big walk" was strung across the right side of the vehicle. When C.P.O. Ahmad Tajuddin arrived at the spot 5 minutes later he found the passengers were in the process of alighting from the bus. He tried to stop them from doing so, but they refused and kept descending from the bus. At this stage the C.P.O. issued a warning through his loud hailer to the effect that those who were gathered in front of him were committing unlawful assembly under section 27 of the Police Act and he ordered them to disperse immediately or face police action. The crowd ignored this warning and walked on towards the direction of the temple. The C.P.O. then proceeded ahead of the crowd and repeated the same warning. Instead of dispersing, one lady member of the group challenged him to arrest them. On the C.P.O.'s instruction the 18 respondents were arrested and taken to the police station. They were subsequently released on bail and charged in Court.

The learned President who sat as a Magistrate hearing the case acquitted and discharged all the 18 respondents without their defence being called. Hence the present appeal to this Court by the prosecution.

In his surprisingly prosaic and somewhat inconclusive judgment the learned President without judiciously going into the merits of the evidence before him or assigning adequate reason therefor, arrived at a bare conclusion that the prosecution had failed to prove that the 18 respondents had participated in an assembly under section 27(5)(a) of the Police Act.

The learned President particularised 4 ingredients which he said the prosecution had to prove *viz:*

(1) All the accused persons had formed an assembly.
(2) There was knowledge on the part of accused persons to take part in this unlawful assembly.
(3) There was intention on the part of all the accused persons to attend the assembly.
(4) Public place.

In respect of the 1st ingredient the learned President offered the following reasoning:

"In this case the passengers of the motor bus were alighting from the said bus going toward the temple which is no offence committed".

To start with it is not known how the learned President arrived at this finding of fact. Nobody had claimed such right to go to the temple to pray in this case, and if such finding was drawn from inference, no indication was given as to how it was so drawn.

The learned President then went on to say that there was no evidence to show that the respondents had formed a group and created chaos and that according to P.W.2 the respondent had gone to the temple one after another.

It would appear from his words that the President was labouring under an erroneous belief that group formation and chaos are the necessary elements in an unlawful assembly and in so far as the finding of fact that the respondent had entered the temple one after another, it was clearly conjectural, unsupported by evidence and made in contradiction of the recorded facts. Nowhere in his evidence did P.W. 2 say words to that effect. In fact he was emphatic throughout that they were proceeding in a group.

As to the second ingredient – or knowledge – the learned President had only this to say:

"The prosecution also failed to prove the knowledge the accused in this case that they had taken part in a public place in an assembly which is convened or organised without licence. From the facts it was disclosed that all 18 accused were going to the temple and to take part in big walk and jog organised by the DAP. In this case the big walk and jog is a sporting event where it does not require a licence. Therefore if the convenor or organiser had not committed an offence how could the person who had taken part committed an offence, it is ridiculous."

It is not altogether clear what the learned President had in mind on these two paragraphs. Was he referring to the lack of knowledge on the part of the respondents that they were taking part in an organised event or was he directing his mind over the absence of knowledge regarding the licence? It would appear from the second above quoted paragraph he found that the respondents had knowledge that the event was an organized one, otherwise he would not have said all these words in the first sentence in the second paragraph.

As for absence of proof or knowledge of a licence having not obtained, the learned President made no further comment but instead made a finding of law that the event was a sporting one which required no licence. If this proposition is legally correct I am afraid one of these days the police might find themselves standing idle and helpless while a million people freely jog by in an organized sport across the Federal Territory without licence.

The learned President missed the point that once there is a gathering of three or more persons in a public place then it is an assembly and when that assembly is an organised one as distinguished from a spontaneous one, then a licence under section 27(2) is required from the police. Failure to comply with the requirement will render firstly the organizer and secondly any participant, with knowledge that such assembly was unlicenced, liable to prosecution under section 27(5)(a) of the Act. The law on this issue has been succinctly set out in the judgment of our learned C.J. in the Federal Court judgment of *Siva Segara* v. *Public Prosecutor*[1] at 216 as follows:

"The first category, that is, those taking part in the assembly, must relate specifically to an assembly, meeting or procession which takes place without a licence issued under the provisions of sub-section (2). The necessary question that calls for determination is what assembly requires a licence under that sub-section. It is, to this effect and in answer to this question that we form the view that subsection (5)(a) has to be construed with reference to subsection (2). Sub-section (2) speaks of an assembly, meeting or procession which is intended to be convened, collected, etc., in other words, an assembly, meeting or procession which is intended to be organized. It is in this respect that in our view the element of intention becomes a necessary element. In the first place, it applies to the convenor or organizer. If therefore a person intends to convene or organize an assembly and he in fact takes part in convening or organizing an assembly envisaged by this subsection and that assembly does take place without the convenor or organizer first obtaining a licence, such assembly is deemed by law to be an unlawful assembly and the convenor or organizer commits an offence under subsection (5)(a) of section 27. Further we form the view and it is in respect of such assembly, that is, the assembly which takes place without a licence issued under the provisions of sub-section (2), that whoever takes part in such an assembly commits an offence under subsection (5)(a). That being the case, knowledge on the part of the person who takes part in such an assembly becomes the essential ingredient of the offence. It is to be observed that both categories of offences apply to those "taking part" in other words, "participation".

Now, the question of knowledge on the part of the respondents is a matter of fact to be drawn from the surrounding circumstances of the case.

The learned President had before him abundant facts from which he could have drawn the appro-

priate inferences, but instead of applying the proper law and giving the requisite consideration to the facts of the case, he chose to dismiss the prosecution case over a mere assumption that the incident was a sporting event which required no licence. Towards the end of the earlier cited passage he took it upon himself to decide that the convenor or organizer had not committed an offence and he thought it ridiculous for the participants to be guilty of the offence when the organizer had not been found to be so. I am afraid I cannot share that view and I think the Federal Court will unlikely endorse such a situation as absurd or inane either. Otherwise, the learned Chief Justice would not have said at page 216 in *Siva Segara's* case:

"Clearly therefore under sub-section (5)(a) itself, there are two separate offences, applicable to two categories of person or persons namely, (a) all persons taking part in such assembly and (b) all persons taking part in convening, collecting, etc., such assembly."

The next point of the judgment dealt with the absence of identification. Mr. Karpal Singh rightly conceded that he is not leaning too much on this ground. Indeed when a police officer arrests 18 people, confines and takes them to the police station, gets the entire group photographed with him, takes down their particulars and then releases them on bail and the same persons as in the photograph appear to answer to the charge read against them, what further identification is required? After all, none of the respondents dispute the fact that they had been arrested by P.W.4 on that day.

Subsequently the learned President expressed his findings that a certain exhibit (P7) found on top of Bukit China, the centre of that morning activity, as irrelevant. Perhaps in saying so he overlooked its possible inferential value to the Court to consider, with other available evidence, that the entire affair was a disguised demonstration.

Although the learned President stated earlier that he considered the 4th ingredient on public place having been proved he omitted entirely to deal with his 3rd ground on intention to participate which he generally categorised as unproved by the prosecution.

The learned President to my mind had arrived at a conclusion founded on misappreciation of law and fact. Having found so I shall now consider whether there were available before him sufficient evidence on which he or any other magistrate could, by applying the correct law and drawing the proper inferences, having arrived at a different conclusion. In so doing I shall be directing my mind to the availability and not the merits of these evidence.

The proper law and facts to be considered by a Court trying a case under section 27(5)(a) of the Police Act have been clearly laid down in the judgment of Hashim Yeop Sani, F.J. in the case of *Public Prosecutor* v. *Cheah Beng Poh & Ors.*[2] and subsequently by way of criminal reference by Abdul Hamid C.J. (Malaya) in the Federal Court case of *Siva Segara (supra).*

The essential ingredients for the offence under the present charge are:

(i) There is an assembly or gathering or the coming together of three persons or more in public place.

(ii) Such assembly or gathering is a convened or organised event as distinguished from a spontaneous gathering of persons for a lawful object.

(iii) No licence has been issued under section 27(2) by the O.C.P.D. for such assembly.

(iv) Each of the persons charged knew that he is taking part in assembly, meeting *etc.* that is being convened or organized without a licence.

The evidence before the lower court on (i) above is beyond question. The C.P.O. stated that a busload of them were stopped at a police roadblock and were proceeding in a group towards the temple. The number which the police managed to arrest on the spot alone added up to 18 persons.

On (ii) above Mr. Karpal Singh confirmed at the hearing that the respondents were not disputing that the event which took place at Bukit China on that unfortunate day was called up and organized by Mr. Lim Kit Siang of the Democratic Action Party. Notwithstanding this statement, I am satisfied that there were produced before the learned President abundant facts and circumstances from which he could have drawn the appropriate inferences. To mention a few, there is firstly the unchallenged testimony of the C.P.O. about newspaper reports and his prior knowledge about the event to be organized. Then there is the huge banners "Save Bukit China" found on the hill declaring the purpose of the event taking place on that day. This objective is again profusely proclaimed on 800 to 900 T shirts including those worn by the Respondents. The 18 respondents had not only

come together in a big group from Selangor, over 150 kilometers away, but they have also ostensibly displayed on large banner, words announcing their common identity as belonging to the same party which had organized the event, as well as the purpose of the trip.

These are very relevant facts which the learned President could have, but did not consider.

Proof on (iii) above, *i.e.*, that no licence had been issued in respect of the event was preferred by the prosecution but dismissed by the learned President on the false assumption that no licence was needed for what he termed as "the walk and jog sporting event where it does not require a licence".

Evidence on (iv) is related to the intention or knowledge of a person. Proof of such intention, except where spoken out by the person himself, must necessarily come from inference drawn from the conduct of the parties and circumstances surrounding the case. The intention on the part of the respondents that they were attending the "Save Bukit China" event organized by the D.A.P. is not disputed and is manifested in the banner on the bus itself which reads "Members of D.A.P. Selangor to join the big walk". Proof of knowledge that the assembly was unlicenced on the other part could have been inferred from the conduct of the respondents themselves. The trial Court could have considered and drawn the necessary inference as to whether members of an organization could have access to the knowledge that no licence was obtained. Again assuming that they did not avail themselves to this knowledge, did it not become obvious to them when they were stopped and disallowed to proceed by the police? Even if it had not appeared so to them, and they did not care to find out, then the moment they were warned by the C.P.O. to the effect that they were taking part in an unlawful assembly, their knowledge became inferrable. This intimation of knowledge was further substantiated by the conduct of one of the respondents when she refused to obey the order and challenged the C.P.O. to arrest them.

On the premises of what I have said earlier this appeal succeeds. The order of acquittal and discharge made by the learned President is set aside.

Looking at the grounds of judgment in its entirety I am of the view that the learned President allowed himself to be unduly influenced by the "walk and jog" name which the organizer had given to this event. On that assumption alone he completely shut out from his mind and brushed aside all considerations of law, fact and surrounding circumstances which are extremely crucial towards a fair determination of this case. A bare dissimulation of an organized event, not entirely recreative in nature, with a sporting name does not make it less reprehensible under our laws relating to public order and unlawful assemblies. A hasty recognition of all sporting events as lawful, without examining its implicative purposes, will negate the object and purpose of section 27(5) of the Police Act and deprive the police of its indispensable authority to prevent public disorder.

As the failure of justice in this case arose out of substantial misapplication of law and facts, I do not consider it fair for the case to be further heard by the same President. Accordingly the case is remitted for re-trial before another Magistrate.

The respondents shall immediately hereafter appear before the Magistrate's Court and be released on entering into the appropriate bonds to appear and be re-tried in accordance with the law.

*Order accordingly.*

Solicitors: *Karpal Singh & Co.*

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## PAVONE v. PUBLIC PROSECUTOR (No . 2)

**[A. Cr. J. (V.C. George J.) September 3, 1985]**
**[Penang – Criminal Appeal No. 45 of 1985]**

*Criminal Law and Procedure – Charge of trafficking in dangerous drugs – Difference in findings of field test and findings of chemist – Difference unexplained – Chain of prosecution evidence broken – Cavalier manner of handling exhibits.*

*Dangerous Drugs – Expert testimony – Exhibits – Handling of – Differences in findings of field test and that of chemist – Missing links in chain of evidence.*

In this case the appellant was charged on a retrial with trafficking in dangerous drugs to wit 412 grammes